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SENATE BILL 574

**48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

INTRODUCED BY

Michael S. Sanchez

AN ACT

RELATING TO LIENS; CLARIFYING MECHANICS' AND MATERIALMEN'S LIEN RIGHTS IN OTHER THAN FEE INTERESTS; EXEMPTING ORIGINAL CONTRACTORS FROM PRE-LIEN NOTICE REQUIREMENTS; ALLOWING ORIGINAL CONTRACTORS TO CANCEL LIENS; ALLOWING ORIGINAL CONTRACTORS TO DEPOSIT SECURITY FOR THE CANCELING OF LIENS; ALLOWING USE OF ARBITRATION TO ENFORCE LIENS; REQUIRING CONTRACTORS TO DEFEND ALL LIEN CLAIMS EXCEPT THOSE DUE TO THE CONTRACTOR IN CASE OF OWNER NONPAYMENT; CLARIFYING FEES AND COSTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 48-2-2 NMSA 1978 (being Laws 1880, Chapter 16, Section 2, as amended) is amended to read:

"48-2-2. MECHANICS AND MATERIALMEN--LIEN--LABOR, EQUIPMENT AND MATERIALS FURNISHED--DEFINITION OF AGENT OF

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1 OWNER.--Every person performing labor upon, providing or  
2 hauling equipment, tools or machinery for or furnishing  
3 materials to be used in the construction, alteration or repair  
4 of any mine, building, wharf, bridge, ditch, flume, tunnel,  
5 fence, machinery, railroad, road or aqueduct to create  
6 hydraulic power or any other structure, who performs labor in  
7 any mine or is a registered surveyor or who surveys real  
8 property has a lien upon the same for the work or labor done,  
9 for the specific contract or agreed upon charge for the  
10 surveying or equipment, tools or machinery hauled or provided  
11 or materials furnished by each respectively, whether done,  
12 provided, hauled or furnished at the instance of the owner of  
13 any interest in the building or other improvement or [~~his~~] the  
14 owner's agent. Every contractor, subcontractor, architect,  
15 builder or other person having charge of any mining or of the  
16 construction, alteration or repair, either in whole or in part,  
17 of any building or other improvement shall be held to be the  
18 agent of [~~the~~] an owner for the purposes of this section."

19 Section 2. Section 48-2-2.1 NMSA 1978 (being Laws 1990,  
20 Chapter 92, Section 2, as amended) is amended to read:

21 "48-2-2.1. PROCEDURE FOR PERFECTING CERTAIN MECHANICS'  
22 AND MATERIALMEN'S LIENS.--

23 A. The provisions of Subsections B through D of  
24 this section do not apply to claims of liens made on  
25 residential property containing four or fewer dwelling units,

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1 to claims of liens made by an original contractor or to claims  
2 of liens made by mechanics or materialmen who contract directly  
3 with the original contractor. For purposes of this section,  
4 "original contractor" means a contractor that contracts  
5 directly with the owner.

6 B. No lien of a mechanic or a [~~materialmen~~]  
7 materialman claimed in an amount of more than five thousand  
8 dollars (\$5,000) may be enforced by action or otherwise unless  
9 the lien claimant has given notice in writing of [~~his~~] the  
10 claimant's right to claim a lien in the event of nonpayment and  
11 that notice was given not more than sixty days after initially  
12 furnishing work or materials, or both, by either certified  
13 mail, return receipt requested, [~~Fax~~] facsimile with  
14 acknowledgement or personal delivery to:

15 (1) the owner or reputed owner of the property  
16 upon which the improvements are being constructed; or

17 (2) the original contractor, if any.

18 C. If the owner or the original contractor claims  
19 lack of notice as a defense to the enforcement of a lien  
20 described in Subsection B of this section, [~~he must~~] the owner  
21 or contractor shall show that upon the request of the mechanic  
22 or materialman [~~he~~] that the owner or contractor furnished to  
23 the lien claimant not more than five days after such request  
24 was made:

25 (1) the original contractor's name, address

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1 and license number, if there is an original contractor on the  
2 project;

3 (2) the owner's name and address;

4 (3) a description of the property or a  
5 description sufficiently specific for actual identification of  
6 the property; and

7 (4) the name and address of any bonding  
8 company or other surety that is providing either a payment or  
9 performance bond for the project.

10 D. The notice required to be given by the claimant  
11 [~~under~~] pursuant to the provisions of Subsection B of this  
12 section shall contain:

13 (1) a description of the property or a  
14 description sufficiently specific for actual identification of  
15 the property;

16 (2) the name, address and phone number, if  
17 any, of the claimant; and

18 (3) the name and address of the person with  
19 whom the claimant contracted or to whom the claimant furnished  
20 labor or materials, or both.

21 E. A person required [~~under~~] by the provisions of  
22 Subsection B of this section to give notice to enforce [~~his~~]  
23 the person's claim of lien may elect not to give the notice,  
24 but may give the required notice at a later time. If [~~he~~] the  
25 person elects to do so, the lien shall apply only to the work

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1 performed or materials furnished on or after the date thirty  
2 days prior to the date the notice was given. The provisions of  
3 Subsections C and D of this section apply to any notice given  
4 under this subsection."

5 Section 3. Section 48-2-9 NMSA 1978 (being Laws 1975,  
6 Chapter 68, Section 1) is amended to read:

7 "48-2-9. PETITION TO CANCEL LIEN--SECURITY.--

8 A. The owner of any building, mining claim,  
9 improvement or structure subject to a lien under Sections  
10 [~~61-2-1 through 61-2-17 NMSA 1953~~] 48-2-1 through 48-2-17 NMSA  
11 1978 or an original contractor having a contract with that  
12 owner may petition the district court for the county in which  
13 the property or a part [~~thereof~~] of it is located for an order  
14 [~~cancelling~~] canceling the lien.

15 B. Upon the filing of the petition, the district  
16 court judge shall examine the lien claimant's recorded demands  
17 and determine an amount sufficient to satisfy the recorded  
18 demands and any other damages, court costs or [~~attorney's~~]  
19 attorney fees [~~which~~] that may be recovered by the lien  
20 claimant. Security, in the amount set by the judge and of a  
21 type approved by [~~him~~] the judge, shall be deposited by the  
22 owner of the property or original contractor with the district  
23 court conditioned on the payment of any sum found to be validly  
24 due to the lien claimant. An owner or original contractor may  
25 not provide a single security for the cancellation of the lien

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1 of more than one claimant.

2 C. When the security is deposited under this  
3 section, the judge of the district court shall immediately  
4 issue an order [~~cancelling~~] canceling the lien and shall notify  
5 the county clerk with whom the lien was filed. Upon the  
6 recording of [~~such~~] the order, the county clerk shall mark the  
7 filed lien as [~~cancelled~~] canceling. When an order is issued  
8 under this subsection, the claimant's lien attaches to the  
9 security and is enforceable as to the security in the district  
10 court in which it is deposited to the same extent as any other  
11 lien provided for in Sections [~~61-2-1 through 61-2-17 NMSA~~  
12 ~~1953~~] 48-2-1 through 48-2-17 NMSA 1978."

13 Section 4. Section 48-2-10 NMSA 1978 (being Laws 1880,  
14 Chapter 16, Section 9, as amended) is amended to read:

15 "48-2-10. LIMITATION OF ACTION TO ENFORCE.--No lien  
16 provided for in Sections 48-2-1 through 48-2-17 NMSA 1978  
17 remains valid for a longer period than two years after the  
18 claim of lien has been filed unless proceedings have been  
19 commenced in a court of competent jurisdiction or in binding  
20 arbitration within that time to enforce the lien.

21 Notwithstanding any other provision of law, a contract,  
22 agreement or understanding that contains a waiver of the right  
23 to file or enforce a lien created pursuant to Sections 48-2-1  
24 through 48-2-17 NMSA 1978 is void as against public policy and  
25 unenforceable."

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1 Section 5. Section 48-2-12 NMSA 1978 (being Laws 1880,  
2 Chapter 16, Section 12, as amended) is amended to read:

3 "48-2-12. CONTRACTOR LIABLE FOR LIENS OF  
4 SUBCONTRACTORS.--~~[Sec. 11.]~~ The contractor shall be entitled to  
5 recover upon a lien filed by ~~[him]~~ the contractor only such  
6 amount as may be due to ~~[him]~~ the contractor according to the  
7 terms of ~~[his]~~ the contract, after deducting all claims of  
8 subcontractors under ~~[him]~~ the contractor who have filed liens  
9 for work done and materials furnished, ~~[as aforesaid and in all~~  
10 ~~cases where a lien shall be filed under this article for work~~  
11 ~~done or materials furnished to any contractor, he shall defend~~  
12 ~~any action brought thereupon at his own expense]~~ and during the  
13 pendency of ~~[such]~~ the action, the owner may withhold from the  
14 contractor the amount of money for which the lien is filed  
15 unless the lien was asserted as a result of the owner's failure  
16 to pay the contractor for work done and materials furnished,  
17 and in case of judgment against the owner or ~~[his]~~ the owner's  
18 property upon the lien, the ~~[said]~~ owner shall be entitled to  
19 deduct from any amount due or to become due by ~~[him]~~ the owner  
20 to the contractor the amount of ~~[such]~~ the judgment ~~[and costs~~  
21 ~~and]~~. If the amount of ~~[such]~~ the judgment ~~[and costs shall~~  
22 ~~exceed]~~ exceeds the amount due by ~~[him]~~ the owner to the  
23 contractor, or if the owner ~~[shall have settled]~~ settles with  
24 the contractor in full, ~~[he]~~ the owner shall be entitled to  
25 recover back from the contractor any amount ~~[so]~~ paid by ~~[him]~~

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1 the [said] owner, in excess of the contract price, and for  
2 which the contractor was originally the party liable."

3 Section 6. Section 48-2-14 NMSA 1978 (being Laws 1880,  
4 Chapter 16, Section 14, as amended) is amended to read:

5 "48-2-14. JOINDER OF ACTIONS--ATTORNEY FEES--COSTS.--Any  
6 number of persons claiming liens may join in the same action,  
7 and when separate actions are commenced, the court may  
8 consolidate them. [~~The court may also allow the prevailing~~  
9 ~~party, as part of the costs, the money paid for filing and~~  
10 ~~recording the lien and reasonable attorney fees in the district~~  
11 ~~and supreme courts] A prevailing party in a dispute arising out  
12 of or relating to a lien action is entitled to recover from the  
13 other party the reasonable attorney fees, costs and expenses  
14 incurred by the prevailing party."~~